No. 13392

In the

UNITED STATES COURT OF APPEALS

for the Ninth Circuit

WESTSIDE FORD, INC., a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM ORDER ENFORCING ADMINISTRATIVE SUBPOENA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

FEDERAL STATUTES, RULES AND REGULATIONS

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I. SUMMARY OF ARGUMENT

This appeal is based upon error of the court below in granting its Order Enforcing Administrative Subpoena dated April 16, 1952. If the subpoena was invalid, it was error to grant the enforcement order.

That order authorized production, inspection and photographing of records and documents not required to be kept under the Defense Production Act of 1950 and in any case necessarily immaterial and

irrelevant to any inquiry under the Act. Nor can relevancy and materiality be determined in the absence of any proper definition of scope and purpose of the investigation. The determination of scope and purpose in the instant case was by its terms inadequate and was not timely served upon Appellant.

The issue of materiality and relevance is always a matter for judicial determination, rather than for the exclusive determination of the Director of Price Stabilization as contended by Appellee.

The photographing of Appellant's records and documents is simply not permitted by the terms of the Act, whether or not it is prejudicial to Appellant. The previous conduct of the parties is a matter for the consideration of the Court. The effect of these errors is such that the Order Enforcing Administrative Subpoena dated April 16, 1952, should be vacated and enforcement of the administrative subpoena dated March 25, 1952, denied.

II. ARGUMENT

A. INTRODUCTION.

The administrative subpoena is not before the Court, but only the judgment and order of the District Court. *Cudmore v. Bowles* (C.A.D.C., 1944), 145 F.(2d) 697. Appellant desires specifically to state, however, that it predicates error of the Court below upon the granting of an enforcement order under the authority of the Defense Production Act

when the administrative subpoena was invalid and unlawfully issued *ab origine*. 50 App. USCA 2155(a) provides for resort to a court for enforcement only in the case of contumacy by, or refusal to obey a subpoena served upon, Appellant. Clearly the power of the Court to issue the order depends upon the validity and legality of the prior administrative demand. If that demand was not properly made, then enforcement must be denied.

B. THE DISTRICT COURT ORDER ENFORCING ADMINISTRATIVE SUBPOENA DATED APRIL 16, 1952, AUTHORIZED INSPECTION OF DOCUMENTS NOT REQUIRED TO BE KEPT UNDER THE ACT AND NECESSARILY IRRELEVANT AND IMMATERIAL TO ANY INQUIRY UNDER THE ACT.

1. Current cost records are not relevant or material to any possible inquiry under the Act and Regulations.

Appellee has nowhere demonstrated in its brief that "repair orders, records which indicate cost of labor and materials expended in the preparation and conditioning of new cars for delivery" are required by O.P.S. regulation to be maintained. Likewise, Appellee has failed to show that such records fall within the ambit of any proper inquiry under the Defense Production Act or regulations issued thereunder. This point deserves some elaboration

in order clearly to expose the approach of the O.P.S. to this question.

First, it is axiomatic that the Act is aimed at price control, not profit control. Second, it is apparent that the charge made by automobile dealers for preparation and delivery is customary and traditional. Both SR 5 to GCPR, 16 FR 1769, and CPR 83, 16 FR 10594, recognize this fact by specifically including such a charge in the ceiling price. Third, the ceiling established for such a charge by GCPR, SR 5 to GCPR, and CPR 83, in each case is based upon the *charge* made for the service during a base period. It should noticed parenthetically that the legality of the arbitrary 5% limitation in CPR 83 is presently being tested in protest proceedings now pending before the Office of Price Stabilization. Regardless of the 5% limitation, however, the ceiling price is first based upon the base period *charge* made for the service. This being true, it is at once apparent that any inquiry as to the *cost* of that service to the dealer is beyond the scope of the Act and outside the jurisdiction of the O.P.S.

Appellee, however, raises the question of so-called "phantom" services. (Appellee's Brief, 12, 25.) That question is simply not presented in this proceeding. Appellee is attempting to justify an inquiry into profits under the guise of an inquiry into charges for services not rendered. All automobile dealers, including Appellant, prepare and condition new cars

for delivery. The O.P.S. has never challenged this fact, but evidently insists upon the right to control the profit margin on the service instead of the price. Appellant cannot agree that the O.P.S. has such untrammeled power under the Act.

Appellant invites the attention of the Court to Interpretation 2 of CPR 83, 17 FR 5117. That was an interpretation of the original version of CPR 83, and, although not in terms applicable to SR 5 to GCPR, is indicative of the view of the O.P.S. on the general subject of the preparation and conditioning charge. That interpretation conclusively establishes that the *charge* for preparation and conditioning during the base period is the basis of the ceiling price therefor except in the one situation covered by Section (4) thereof where the dealer cannot separate his base period charge from the total selling price of the automobile. There is no showing here that Appellant must resort to this Section to establish its ceiling price for preparation and conditioning, and, in any event, the relevant cost period extends only through February 24, 1951.

Appellant again submits that the cost records demanded are completely irrelevant and immaterial to this inquiry and are beyond the scope of the regulations involved herein.

Appellant is confused by Appellee's discussion of the Capehart Amendment (Appellee's Brief 11, 12). Appellant originally referred to the Capehart

Amendment, 50 App. USCA 2102(d)(4), to support the proposition that any inquiry into costs beyond June 24, 1951, is outside the scope of *any possible proper inquiry* under the Act. (Appellant's Brief, 27). No section of the Act refers to costs at any time subsequent to that date. However, as Appellee points out, this provision of the Act contemplates an application and showing of costs by the affected seller, and Appellant has not stated or suggested that it has applied for such an adjustment. This being true, Appellant can only assume that Appellee *concedes* that the Capehart Amendment does not justify this inquiry into costs. If so, Appellant willingly acquiesces.

2. Current cost records are not required to be kept under the Act and Regulations.

Appellee itself "baldly" states, at page 25 of Appellee's Brief, that such cost records ". . . are specified as records required to be kept under CPR 83, Section 10(c) and (e). Section 16 of the GCPR requires keeping and preservation of records as to all commodities and services." Such is not the case. Section 10 of CPR 83 requires only that the customer invoice show the *charge* made for each item specified in that Section. Section 16 of GCPR requires that certain *base period* cost records be maintained, but nowhere requires that any current cost records be maintained.

C. MATERIALITY AND RELEVANCY ARE ALWAYS MATTERS FOR JUDICIAL DETERMINATION.

Appellee takes the position (Appellee's Brief, 13) that:

> "It is the prerogative of the District Enforcement Officer to determine the extent and relevancy of the data to be inspected."

Appellant has argued at pp 18-22 of its Brief that the issues of relevance and materiality are always factual issues for judicial determination, and has cited numerous authorities, especially *Bowles v. Cherokee Textile Mills,* (D.C.E.D. Tenn, 1945), 61 F. Supp. 584, to sustain its contention. Appellant reaffirms its stand upon this issue upon the argument made and authorities cited in its Brief.

It remains only to consider the authorities cited by Appellee. The determination to which reference was made in *Benenson Realty Corp. v. Porter*, (E.C.A., 1946) 158 F.(2d) 163, was a rent order; the case did not in any way deal with the subpoena process. The quotation from *Bowles v. Abendroth* (C.A. 9, 1945), 151 F.(2d) 407 is too brief to give its full import. The fuller quotation follows:

> "We think the courts may not substitute their judgment of the necessity or desirability of an investigation for that of the agency made responsible by Congress for the policing of wartime prices. Cf. Bowles v. Glick Bros. Lumber Co., 9 Cir., 146 F.(2d) 566, 570, 571. *Enforcement may, of course, be declined if the administrative subpoena is vague or unreasonably*

> *burdensome,* Hale v. Henkel, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652, *or if the proposed inquiry is not authorized by statute,* Harriman v. Interstate Commerce Commission, 211 U. S. 407, 29 S. Ct. 115, 53 L. Ed. 253; Cudahy Packing Co. v. Holland, 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895. * * *" (Italics supplied)

Appellee supplies the key to the whole problem in its quotation from *Creedon v. Warner Holding Co.,* (CA 8, 1947), 162 F.(2d) 115:

> "It requires the presence of unusual and prejudicial circumstances to show that a request of the Administrator to inspect *relevant and material* books and papers is unreasonable." (Italics supplied)

With this Appellant wholeheartedly agrees. The quotation assumes, first of all, that the books and papers are *relevant* and *material.* Once this is found, of course unusual and prejudicial circumstances must be shown if the request to inspect is to be deemed unreasonable. But the initial requirement remains, that the books and papers be relevant and material; and this Appellee has clearly indicated in its choice of authority.

The case is of further interest for its lucid statement at p. 119 of the requirements for denial of enforcement of an inspection requirement:

> "To determine whether the denial of enforcement of the Inspection Requirement was arbitrary *the reviewing court must inquire* whether the Act of Congress under which the Administrator purports to act is constitutional; whether, if so, the Act authorizes an inspection of private books and records; *whether the facts sought to be investigated are relevant;* and

> whether the request for inspection is reasonable. * * *" (Italics supplied)

Appellee would take *Bowles v. West Poultry & Dairy Products Co.,* (C.A. 9, 1946), 153 F.(2d) 32, as a model example of the Court's powers of inquiry. However, the decision therein was necessarily limited by the issues raised, and, as the Court stated:

> "The sole ground of appellee's refusal of the inspection of its records was the claimed invalidity of the regulation, the continued violation of which was admitted."

How, then, could the court rule on the issues of materiality and relevancy? But in the instant case, Appellant raised all issues, including the issues of materiality and relevancy, by its Objections and Answer to Motion Requiring Respondent to Appear, Testify and Produce Certain Documents, (Tr 13), placing the issue squarely before the Court. Nor, of course, does Appellant admit any violations.

Appellee relies on the presumption of regularity of proceedings of administrative agencies, cited in the *Northwest Poultry* case, supra. But, in that case, it has been shown, there was objection not to the acts of the Administrator, but to the validity of the regulation involved. Once the court held the regulation valid, the presumption of regularity of the Administrator's acts followed, since there was nothing in the record to rebut that presumption.

In the present case, the Objections (Tr 13) raised by Appellant squarely confront the presumption.

Evidence, in the form of affidavits, was adduced in support of the Objections. The case was, therefore, before the Court on evidence; the presumption ceased to operate.

It therefore appears that Appellee has nowhere supported its contention that relevance and materiality are the sole province of the Director. The authority to the contrary, cited by Appellant, stands unchallenged, so far as Appellee's Brief is concerned. Appellant once more submits that there was not, and could not in the nature of things, have been any determination by the District Court of the relevance and materiality of the information sought; and that therefore, the Order Enforcing Administrative Subpoena dated April 16, 1952, should be vacated.

D. AN ADEQUATE DEFINITION OF SCOPE AND PURPOSE MUST BE MADE AND SERVED UPON APPELLANT.

Implicit in Appellee's Brief is the belief that a definition of scope and purpose has no function with reference to the subject of the investigation, and was created only for the administrative convenience of the O.P.S. Appellant has set forth in its Brief its belief that the function of the determination of scope and purpose is to apprise the subject of the investigation of its scope and purpose so that he may obey the subpoena.

Appellee states correctly that, under the Emergency Price Control Act of 1942, 50 App. USCA 922 *et seq,* there was no requirement of a showing of probable cause before enforcement of an administrative subpoena. *Hagen v. Porter,* (C.A. 9, 1946). 156 F. (2d) 362. The reason is clear. A careful study of that legislation shows no limitation upon the subpoena power which was granted in aid of "such studies and investigation, to conduct such hearings, and to obtain such information as he deems necessary or proper to assist him * * * in the administration and enforcement of this Act." 50 App. USCA 922(a).

There was, in short, no requirement of the definition of scope and purpose of the subpoena proceeding, such as is found at 50 App. USCA 2155(a).

A comparison of the two Acts shows a clear intent on the part of Congress to limit the exercise of the subpoena power under the current Act; and this intent should be considered in the light of those cases which held there was no need for a showing of probable cause in an enforcement proceeding under the 1942 Act.

Of what avail is the definition of scope and purpose if it reposes in the darkness of the Director's files? What purpose can then have been served by this express statutory requirement? Why should any definition be made, if it is as broad as the scope of the appellant's business?

Appellant once more submits that the purpose of this requirement is to assure that the contemplated investigation is authorized by the Act, and to enable the subject of the investigation to comply with the demands made upon him.

Appellee, referring to the purported definition of scope and purpose, states (Appellee's Brief, p. 18):

> "It is difficult to imagine what more could have been put into the document unless the results of the investigation had been known in advance."

This is precisely the vice of the attempted definition. It in no way defines. Appellant still does not know the real object of this investigation. It has simply been commanded to open all records, whether or not they possibly pertain to price enforcement, to inspection by the O.P.S. Appellant once more affirms the interpretation of the requirement of scope and purpose set forth in its Brief, and once more states that adequate definition of scope and purpose will necessarily govern the vital issues of materiality and relevancy.

E. PHOTOGRAPHING RECORDS IS NOT PERMITTED BY THE ACT, WHETHER OR NOT PREJUDICIAL.

Appellee's argument with regard to the provision in the lower court's order permitting photographing is contained in the heading "K. PHOTOGRAPHING NOT PREJUDICIAL." (Appellee's Brief, 29). The

amazing contention of the O.P.S. is that it may do an act not authorized by statute so long as a different act accomplishing the same end is authorized by statute, on the ground that no one is prejudiced thereby. The Defense Production Act permits the O.P.S. to obtain certain information by following certain procedures. 50 App. USCA 2155(a). The O.P.S. may in a proper case subpoena documents and refer to them and obtain information from them for lawful purposes. The Act *does not,* however, authorize the copying or photographing of books and records. The fact that Rule 34 of the Federal Rules of Civil Procedure permits copying or photographing of evidentiary writings in a civil lawsuit is completely irrelevant.

Appellant sympathizes with the O.P.S. in its apparent inability to obtain that power from Congress, but must point out that the O.P.S. is not in such dire straits as are complained of in Appellee's Brief at page 31. Obviously by following the proper procedure the O.P.S. can obtain all the information it needs upon which to determine compliance or base an overcharge action in which the evidence for trial can be obtained by copying or photographing under Rule 34.

It seems fair to remark that a denial by Congress to a temporary administrative agency of the power to microfilm business records and accounts wholesale merely to determine compliance with its regula-

tions can hardly be denominated, as Appellee suggests, "one of the most amazing blunders of all times."

F. THE COURT SHOULD CONSIDER THE PREVIOUS CONDUCT OF THE PARTIES.

It was and is the purpose of Appellant to bring to the attention of the Court the facts illustrating the previous dealings of the parties. As set forth in its Brief (pp. 42-43), Appellant had offered full cooperation to the O.P.S. and had permitted extensive investigation of its books and records, furnishing office space to agents of the O.P.S. for prolonged periods. It was only when the demand was made to remove and microfilm records that Appellant resisted. Such a fact is worthy of the Court's notice.

Appellant leaves to the Court to determine the meaning of the language of Colman, in his affidavit, charging violation of ceiling prices. (Tr 12).

The Court should certainly consider these elements in determining the merit of Appellee's application for enforcement.

III. CONCLUSION

By a fine display of mathematical logic Appellee ridicules the prejudicial cumulative effect of a number of individual errors each of which might not by itself be a ground for reversal. Fortunately the judicial process is not bound by the inflexible rules

of arithmetic but is instead a dynamic institution well equipped to weigh the intangible factors with the tangible in adjusting social conflicts. Appellee's lack of understanding of this point is consistent with the fact that administrative agencies are continually embroiled in litigation over procedural defects and arbitrary action. "Almost" fair play never has and never will be equated with fair play under the Fifth Amendment.

Running through Appellee's entire Brief is the underlying assumption that an individual should not assert his legal rights if they interfere with administrative convenience. Appellee seems to imply that the procedural rights of the individual are subservient to the substantive goals of the price stabilization program, and that Appellant should not stand on its procedural rights if the O.P.S. means well. Thus, Appellee expresses amazement that this proceeding is before this Court if Appellant would accede to a properly instituted and conducted inspection (Appellee's Brief, 22), cannot believe that Appellant's arguments are seriously intended (Appellee's Brief, 31), and accuses Congress of blunders and retrogressive thinking (Appellee's Brief, 29, 31).

This case is before the Court solely because the O.P.S. proceeded unlawfully toward a lawful objective. Appellant, as the subject of this procedure, had a right to and did resist such action in Court.

Such resistance is the right of every citizen, and should not be taken lightly by the United States or any of its agencies or officials.

If Appellant has not yielded in its position, neither has the O.P.S. offered or attempted to correct its methods. This being the case, it is left to this Court to fix the limits of the administrative authority.

Appellant, therefore, prays that the Order Enforcing Administrative Subpoena, of April 16, 1952, be vacated and set aside; and that enforcement of the administrative subpoena, of March 26, 1952, be denied.

Respectfully submitted,

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